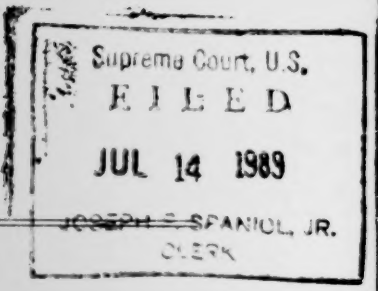
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No. 88-



In The

Supreme Court of the United States

October Term, 1988

LEON KATZ, ROBERT A. WRIGHT, JOHN F. RAUHAUSER, JR., WILLIAM E. PFADT, On Their Own Behalf And On Behalf Of All Others Similarly Situated

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED

1. Do article V, section 16(b) of the Pennsylvania Constitution and its implementing statute, 42 Pa. Cons. Stat. Ann. § 3351 (Purdon 1981), requiring that judicial officers of Pennsylvania be retired at the age of seventy, violate the equal protection clause of the fourteenth amendment to the United States Constitution?

2. Do the aforementioned provisions violate the due process clause of the fourteenth amendment by subjecting judges to an irrebuttable presumption of incompetence at the age of seventy and by depriving judges of a property right without an individual determination of fitness?

PARTIES

The parties in the court below are as set forth in the caption, with the exception that Harold Gondelman, Esquire, original petitioner below, and the Honorables James F. Clarke and Charles A. Lord, intervenors below, have indicated that they no longer have an interest in the outcome of this appeal.

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Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Four Judges from across the Commonwealth of Pennsylvania, the Honorables Leon Katz, Robert A. Wright, John F. Rauhauser, Jr. and William E. Pfadt, bring this petition because they desire to complete their terms of elective office without premature forced retirement, and to have the right, if they so desire, to run for retention for another term.

Over the past 20 years, since article V, section 16(b) of the Pennsylvania Constitution (mandating age 70 judicial retirement) was adopted, there have been profound

changes in federal law and public attitudes toward compelled retirement based solely on age. These changes have been spurred on by the remarkable longevity revolution discussed below at p. 22, whereby some experts predict that a person born after the year 2000 will have a life expectancy of 100 years.

Petitioners are among a group of mature, experienced judges whose services are valued and needed on the trial bench of Pennsylvania. This same group is unfairly and unconstitutionally removed from the bench by article V, section 16(b) of the Pennsylvania Constitution, which provides that all state judicial officers "shall be retired upon attaining the age of seventy years." Petitioners and other state court judges daily hear the pleas of citizens who come to the courthouse to have their rights vindicated. Yet these same judges must shed their own constitutional rights at the courthouse door.

In challenging mandatory judicial retirement, petitioners have been rebuffed by the state courts, which – following precedent from this Court in cases involving police and foreign service officers (which cases have not been examined by this Court in more than 10 years[1]) – have applied a "rational basis" test to petitioners' equal protection and due process claims. Petitioners have been denied even the opportunity to present evidence to show that the mandatory retirement provisions at issue are not in fact rationally related to a legitimate state goal.

Petitioners assert that there are important legal and public policy considerations that classifications based on

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[1] *See infra* pp. 13-15.

age should be subject to strict judicial scrutiny under the equal protection clause of the Fourteenth Amendment and that the contrary precedents cited from this Court have no relevance to cases such as this one involving the high office of judge. In addition, petitioners assert that the mandatory retirement scheme subjects them to an irrebuttable presumption of incompetence upon reaching the age of seventy, in violation of the due process clause of the Fourteenth Amendment. Petitioners are entitled to judgment as a matter of law and ask that the Court remand this case with instructions to enter judgment on behalf of petitioners. At the very least, the Court is requested to remand this action to the state trial court to allow petitioners to develop a factual record.

OPINIONS BELOW

The opinions of the Commonwealth Court of Pennsylvania are reported at ___ Pa. Commw. ___, 550 A.2d 814 (1988) and are set forth in the Appendix, A-24.

The opinion of the Supreme Court of Pennsylvania is reported at ___ Pa. ___, 554 A.2d 896 (1989) and is set forth in the Appendix, A-1.

BASIS OF THE COURT'S JURISDICTION

This petition is brought pursuant to 28 U.S.C. § 1257(a), drawing into question the validity of article V, section 16(b) of the Pennsylvania Constitution, and 42 Pa.

Cons. Stat. Ann. 3351 (Purdon 1981), on the ground that they violate the Constitution of the United States.

Petitioners, elected judges of the Courts of Common Pleas of various counties in Pennsylvania, as well as other petitioners no longer parties to this action, sought declaratory relief in the Commonwealth Court of Pennsylvania, on the grounds that the aforementioned provisions violated both the United States Constitution and other provisions of the Pennsylvania Constitution. Respondent the Commonwealth of Pennsylvania raised preliminary objections in the nature of a demurrer, and appellants applied for summary relief pursuant to Pa. R. App. Proc. 1532(b).

The Commonwealth Court on November 3, 1988 overruled respondent's preliminary objections and denied petitioners' application for summary relief, and ordered respondent to answer the complaint within twenty days. The Commonwealth Court certified the action for interlocutory appeal to the Supreme Court of Pennsylvania pursuant to Pa. Cons. Stat. Ann. § 702(b) (Purdon 1981). A-47-48. Petitioners and respondent each filed Cross-Petitions for Permission to Appeal, and both petitions were granted.

On March 1, 1989, the Supreme Court of Pennsylvania entered an order sustaining respondent's preliminary objections and dismissing the action. A-1. On March 15, 1989, petitioners filed a timely Application for Reargument, which was denied on April 18, 1989. A-49. This petition is timely pursuant to 28 U.S.C. § 2101(c) and Rules 20.2 and 20.4 of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

This action involves the equal protection and due process clauses of the fourteenth amendment to the United States Constitution, U.S. Const. amend. XIV, § 1:

> No State shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article V, section 16(b) of the Pennsylvania Constitution provides as follows:

> Justices, judges and justices of the peace shall be retired upon attaining the age of seventy years. Former and retired justices, judges and justices of the peace shall receive such compensation as shall be provided by law. No compensation shall be paid to any justice, judge or justice of the peace who is suspended or removed from office under section eighteen of this article or under Article VI.

42 Pa. Cons. Stat. Ann. § 3351 provides as follows:

> Judges and district justices shall be retired upon reaching the age of 70 years.

STATEMENT OF THE CASE

Judges of the Pennsylvania courts are elected, with the exception that some are appointed temporarily to fill vacancies created by the retirement, resignation or other removal from office of an elected judge during his or her elective term. Pa. Const. art. V, §§ 13(a), (b). The standard elective term on the bench is ten years. Pa. Const. art. V, § 15(a). An elected judge reaching the end of his or her

term may run for another term in an uncontested, "yes or no" retention election. Pa. Const. art. V, § 15(b).

However, all judges, justices and justices of the peace must retire at age seventy. Pa. Const. art. V, § 16(b). Retired judges may, with their consent, be appointed to "temporary service" by the Chief Justice and at the Chief Justice's discretion. Pa. Const. art V, § 16(c); Pa. R. Jud. Admin. 701(e). Judges in "temporary service" are only paid a *per diem* for days actually spent in the courtroom.

1. The Original Action Below

This action was originally brought by Harold Gondelman, an individual practicing law in Allegheny County, Pennsylvania who has since been replaced by the present petitioners, all of whom have standing (not challenged) to bring this action.[2]

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[2] On June 10, 1988, Mr. Gondelman filed a Petition for Review in the Nature of a Complaint for Declaratory Relief in the Commonwealth Court of Pennsylvania. Such action was within that court's original jurisdiction. The Petition challenged the mandatory retirement provisions of the Judicial Article of the Pennsylvania Constitution and the Pennsylvania Judiciary Code, as violating the equal protection and due process clauses of the fourteenth amendment to the United States Constitution and as being inconsistent with article I, sections 25 and 26 of the Pennsylvania Constitution.

The named defendant, the Commonwealth of Pennsylvania, on July 1, 1988 filed preliminary objections in the nature of a demurrer and in the nature of a petition questioning the court's jurisdiction. The jurisdictional challenge was based on the premise that Gondelman, who was not a judge, lacked standing to challenge mandatory retirement of judges. In view of the subsequent intervention of individual judges, the issue of Gondelman's standing was dropped.

On September 26, 1988, by stipulation with the Commonwealth, the Honorable Leon Katz was granted leave to intervene as a petitioner. At various times thereafter, five other judges of the Common Pleas bench of Pennsylvania were granted leave to intervene: the Honorables Robert A. Wright, John F. Rauhauser, Jr., James F. Clarke, Charles A. Lord and William E. Pfadt.

2. Motion for Summary Relief Before the Commonwealth Court

On October 3, 1988, the intervening judges filed a motion for summary relief, which the Commonwealth Court scheduled for argument at the same time as the Commonwealth's preliminary objections, which argued that Gondelman failed to state a claim on which relief could be granted, because (1) the Court of Appeals for the Third Circuit had upheld the constitutionality of the challenged provisions under the United States Constitution in *Malmed v. Thornburgh*, 621 F.2d 565 (3d Cir.), *cert. denied*, 449 U.S. 955 (1980); and (2) one provision of the state constitution could not be invalidated under another section of the same constitution.

After a hearing en banc, the court issued an order *per curiam* overruling the Commonwealth's preliminary objections but denying the plaintiffs' motion for summary relief. The court's order certified that the case was appropriate for interlocutory appeal to the state Supreme Court.

3. The Decision and Opinion by the Court of Original Jurisdiction

Although the Pennsylvania Commonwealth Court was split 3-3 on Petitioners' state constitutional claim, all six judges who participated agreed that petitioners stated a claim on which relief could be granted under the equal protection and due process clauses. The Opinion In Support Of Denying Summary Relief And Overruling Preliminary Objections (Palladino, J.), A-24, began its discussion of the federal constitutional arguments by noting that similar arguments were made by a group of five Pennsylvania trial judges in a declaratory judgment suit brought in federal district court in 1978. The district court agreed with the judges on both the due process and equal protection arguments. *Malmed v. Thornburgh* (*Malmed I*), 478 F. Supp. 998 (E.D. Pa. 1979). However, the Third Circuit Court of Appeals reversed. *Malmed v. Thornburgh* (*Malmed II*), 621 F.2d 565 (3d Cir.), *cert. denied*, 449 U.S. 955 (1980).

According to the court, "[c]areful review of both decisions shows disagreement concerning (1) viability and application of the 'irrebuttable presumption' doctrine and (2) application of the equal protection rational basis test. At this preliminary point in the litigation of the instant case, we are unwilling to adopt the rationale of either decision." A-38-39. The court stated that it was unwilling to adopt either rationale because no factual record yet existed, while the determinations of the federal courts in *Malmed I* and *II* were based on an evidentiary record. A-39.

Because of the passage of time (ten years since the Third Circuit's decision in *Malmed II* and twenty years

since the enactment of the mandatory retirement provision in the Constitution), the court stated that petitioners' "challenges to the constitutionality of the mandatory retirement of judges at age 70, based on the fourteenth amendment of the United States Constitution, warrant our consideration." A-40.

The court agreed with the Third Circuit's observation in *Malmed II* that in assessing the constitutionality of the provision mandating retirement of judges at age 70, the four reasons for recommending the mandatory retirement provision, expressed by the Judiciary Subcommittee of the Preparatory Committee for the Pennsylvania Constitutional Convention of 1967, must be considered:

> These reasons are quoted in *Malmed II*, 621 F.2d at 568, and can be summarized as follows:
>
> (1) increase in "judicial manpower" by bringing in younger judges and permitting retired judges to serve as senior judges;
>
> (2) "eliminates unpleasantness of removing aged and disabled judges on an individual selective basis,"
>
> (3) prevention of harm by senile judges "offsets loss of judges who retain full powers past normal age," and
>
> (4) "corresponds with current trends towards mandatory retirement in other public and private employments."
>
> The passage of time and experience may have shown that these reasons no longer exist or that mandatory retirement of judges at age 70 has not achieved the objectives sought.

A-40-41 (paragraphing added for clarity). The court gave examples of the kinds of evidence it might consider in

deciding whether the mandatory retirement provisions passed the rational basis test:

> *First,* "*Actuarial tables* showing normal life expectancy and studies demonstrating the 'normal age' to which there is retention of full mental powers in 1988 could be used as evidence to refute the premise that age 70 is past the normal age at which 'full powers' are retained." A-41.
>
> *Second,* "Evidence as to disuse or removal of mandatory retirement ages in public or private employment would tend to demonstrate there is *no 'current trend* towards mandatory retirement.' " *Id.*
>
> *Third,* "Evidence showing that *competent judges decline to seek* a senior judge position, because of the loss of status, might imply a lack of experienced judicial personnel in certain courts and offset any increase in 'judicial manpower' gained by bringing in young judges." *Id.*
>
> *Finally,* "Data indicating *the number of judges who,* after investigation and recommendation by the Judicial Inquiry and Review Board, *have been removed from office* could be used to demonstrate that eliminating the 'unpleasantness of removing aged and disabled judges on an individual selective basis' is no longer a legitimate government reason." A-41-42 (emphasis added).

4. The Decision and Opinion of the Pennsylvania Supreme Court

Strict Scrutiny Test

The Pennsylvania Supreme Court declined petitioners' request that it apply a heightened degree of scrutiny to the mandatory retirement provisions. A-11.

The Court grounded its decision on this Court's pronouncement in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), and *Vance v. Bradley*, 440 U.S. 93 (1979).

Initially, the court cited this Court's rejection, in *Murgia*, 427 U.S. at 313-14, of the argument that age is a "suspect class." A-8.

However, the court quoted extensively from Justice Marshall's "persuasive dissent" in *Murgia*:

> Although we have called the right to work "of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure," . . . , the Court finds that the right to work is not a fundamental right. And, while agreeing that "the treatment of the aged in this nation has not been wholly free of discrimination" the Court holds that the elderly are not a suspect class.

A-9, *quoting Murgia*, 427 U.S. at 317-18 (Marshall, J., dissenting).

"Notwithstanding the appealing tone of this dissent," the court stated, "the majority's position articulated in *Vance v. Bradley*, leaves little question that a rational basis analysis is the acceptable standard for assessing a forced retirement based solely upon a prescribed age without offending equal protection concerns." A-9-10 (citations omitted).

The court concluded that neither petitioners nor the three amici curiae (the Philadelphia Bar Association, the Pennsylvania Defense Institute, and the Pennsylvania Trial Lawyers' Association) had offered a sufficient basis "in view of the decisions of the U.S. Supreme Court," for

applying a heightened degree of scrutiny to the mandatory retirement provisions. *Id.*

Rational Basis Test

Regarding the application of the rational basis test to the mandatory retirement provisions, the Pennsylvania Supreme Court, at A-12, described the purported bases for the provisions similarly to the Commonwealth Court's description. *See* p. 9, *supra*. The court rejected the Commonwealth Court's ruling that a factual record should be developed. After reviewing the facts which the lower court had suggested the plaintiffs have the opportunity to prove, the state Supreme Court insisted that even if these considerations could be proven, they would be irrelevant to the courts analysis: "the United States Supreme Court made clear that we must seek only the assurance that the intent of the classification at issue bears *some fair relationship to a legitimate public purpose.*" A-14-15 (emphasis added, citations omitted).

Finally, the court quoted from the opinion of the Court of Appeals for the Fifth Circuit in *Hatten v. Rains*, 854 F.2d 687, 689-90 (5th Cir. 1988), *cert. denied*, 57 U.S.L.W. 3812 (June 12, 1989), in which that court upheld a similar mandatory retirement provision in the Texas Constitution. In *Hatten*, ironically, an 82-year-old federal Circuit Judge wrote the opinion ruling on whether a 75-year-old state judge could constitutionally be forced to retire. The Pennsylvania Supreme Court quoted the Court of Appeals as stating " 'though there is some merit to [the] argument that [the mandatory retirement provision] violates fundamental . . . rights, our hands are tied by the

Supreme Court. Perhaps unfolding years will open eyes that are now closed. Until then, we are bound by precedent to affirm.' " A-16.

REASONS FOR GRANTING THE WRIT

I. PENNSYLVANIA'S SCHEME OF MANDATORY RETIREMENT FOR JUDGES VIOLATES EQUAL PROTECTION

The mandatory retirement provisions violate the equal protection clause of the Fourteenth Amendment by unreasonably discriminating between judges under age 70 and those over age 70 and unreasonably discriminating between judges and all other elected and appointed public officials, who are not subject to any mandatory retirement provision.

In *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), *Vance v. Bradley*, 440 U.S. 93 (1979), this Court upheld mandatory retirement provisions against equal protection challenges. The teaching of those cases is not that mandatory retirement provisions will always pass constitutional muster; it is simply that, under the facts and circumstances of those particular cases, the standard of judicial review was rationality and the statutes at issue were rationally related to furthering a legitimate state interest.

Murgia concerned a Massachusetts statute requiring retirement of state police officers at age 50. This Court held that because public employment is not a fundamental right and the aged are not a suspect class, the statute should be examined under the rational basis standard.

Murgia, 427 U.S. at 312-14. This Court found that "[The] nature of the duties to be performed [by state police officers] in all weathers is arduous in the extreme," *Id.* at 314 n.7, and that the mandatory retirement statute rationally furthers the legitimate state interest of "seek[ing] to protect the public by assuring physical preparedness of its uniformed police." *Id.* at 314.

Vance, supra, involved the mandatory retirement of foreign service officers at age 60. This Court found that "the Foreign Service involves extended overseas duty under difficult and often hazardous conditions" leading to "wear and tear on members of this corps." 440 U.S. at 103. The mandatory retirement statute was held to be rationally based because it "minimizes the risk of less than superior performance by reason of poor health or loss of vitality." *Id.*

By sharp contrast, the instant case involves judges, as constitutional officers of the Commonwealth chosen by the people, who are charged with the awesome responsibility to serve as an independent bulwark between the people and their government in the protection of their most treasured and valued rights of personal freedom, and protection of their property. Petitioners seek reversal of the ruling of the Pennsylvania Supreme Court not only on behalf of themselves and other judges, but also on behalf of the voters who elected them and all other citizens whose lives are affected, in ways seen and unseen, by the quality and independence of the judiciary.

A. The Mandatory Retirement Provisions At Issue Do Not Meet Even A Rational Basis Test

The mandatory retirement provisions at issue in this case do not meet even the minimal test of rationality. Unlike the positions at issue in *Murgia* and *Vance*, the position of judge is far more important than performing "mere public employment" such as a police or foreign service officer. Furthermore, it does not involve arduous physical exertion or difficult and hazardous overseas duty. Nor is there any evidence of a correlation between age and the ability to render competent judicial service. Thus, the rational bases cited in those cases are irrelevant to the instant case.

In addition, the four "rational bases" relied upon by the Pennsylvania Supreme Court do not stand up when subjected to the proper degree of scrutiny.

As summarized in the Pennsylvania Supreme Court's opinion, these rationales are:

> (1) Increase in "judicial manpower" by bringing in younger judges and permitting retired judges to serve as senior judges;
>
> (2) "Eliminates unpleasantness of removing aged and disabled judges on an individual selective basis";
>
> (3) Prevention of harm by senile judges "offsets loss of judges who retain full powers past normal age;" and
>
> (4) "Corresponds with current trend towards mandatory retirement in other public and private employments."

554 A.2d at 901 n.7. For the following reasons, these purported rational bases are not legitimate excuses for discriminating against individuals based on their age:

1. *Removing older judges to make room for younger ones is unfair, legally unsupportable and unwise.* The first rationale proffered by the Commonwealth is that mandatory retirement is not discriminatory because it is intended to keep the services of senior judges while making room for younger people to enter the judicial system. This amounts to an argument that "we are not making you retire because you are old. We are making you retire because you are not young."

The logic of this distinction is nonexistent. Forcing the retirement of older persons in order to provide opportunities for younger persons is the essence of unlawful age discrimination. The federal courts have recognized as much in interpreting the prohibition against age-based discrimination found in the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(a) (1982). One way of stating a prima facie case in an action under that statute is to show that the plaintiff, after being "laid off," was replaced by a younger worker. *See, e.g., Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir.), *cert. dismissed*, ___ U.S. ___, 108 S. Ct. 26 (1987); *Dreyer v. Arco Chem. Co.*, 801 F.2d 651 (3d Cir.), *cert. denied*, 480 U.S. 906 (1987).

Furthermore, such a rationale flies in the face of compelling public policy considerations that reinforce the position petitioners advance. The Pennsylvania justice system, as well as those of other states, is blessed with many mature, hardworking, highly competent, experienced judges who constitute a vital leadership core. They

add a synergistic and cohesive force to strengthening the benches on which they sit, particularly because of special expertise acquired in, for example, complex multi-party litigation.

The public interest is not served by prematurely forcing these mature, experienced judges off the bench before their elected terms expire. Additionally, because of justified dissatisfaction with the current status of senior service, there is a high risk that the best qualified judges will quit.[3]

Moreover, if turnover of judges is deemed desirable to bring in new, younger (and consequently less experienced) judges, – a premise that is highly questionable – there is a far easier and non-discriminatory way to accomplish such an objective – i.e. by limiting the years

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[3] According to findings of fact entered by the district court in *Malmed I*, senior judge status on "temporary service" is a far cry from the favorable and eminently fair terms for senior judicial service in the federal system:

1. In Pennsylvania, "temporary service" judges cannot add to their pensions, and in fact must draw from their retirement accounts thus diminishing the pension estate available to beneficiaries at the judge's death. 478 F. Supp. at 1006.

2. They are paid only a *per diem* amount for days in court and are not paid for time spent in chambers or attending judicial conferences. *Id.* at 1007.

3. In addition, these judges receive no paid vacation time or paid sick leave. *Id.*

Clearly, senior service is no substitute for active service and virtually amounts to volunteer labor by the retired judges.

of service or the number of terms a judge can serve as is frequently the case with officers of the executive branch.

2. *Chronological age bears no scientific relationship to mental competence.* Avoiding the "unpleasantness" of removing incompetent judges on an individual basis is merely a way of restating a rule of "administrative convenience." In order to relieve some unpleasantness and inconvenience in removing unqualified judges from the bench, the mandatory retirement provision drops the guillotine blade upon all of the judges of the Commonwealth, regardless of their individual merit. Administrative convenience cannot make valid what is otherwise a violation of due process of law. *Califano v. Goldfarb*, 430 U.S. 199 (1977); *see Cleveland Bd. of Ed. v. LaFleur*, 414 U.S. 632 (1974); *Vlandis v. Kline*, 412 U.S. 441 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972). Similarly, merely avoiding some hypothetical inconvenience ought not to validate a discriminatory burden placed on an entire class of people – a class that is constituting an increasing percentage of the population.

Furthermore, in Pennsylvania, a Judicial Inquiry and Review Board (JIRB) was established in 1968, with constitutional powers to remove a judge for a host of reasons, including "disability seriously interfering with the performance of his duties."[4] Rule 6(b) of the Rules of Procedure Governing the JIRB allows the Board to require a judge to submit to a physical or mental examination.

Prior to 1968, when the mandatory retirement provision went into effect, there was no effective means to

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[4] Pa. Const. art. V, § 18(d).

remove an incompetent judge, and the JIRB had not, as yet, solidified its role in this process. The mandatory retirement provision is, therefore, not now necessary to remove unfit judges. It is JIRB's duty and function to investigate and remove incompetent judges *of any age* and at *any* time, totally without regard to chronological age.

Chronological age bears no scientific relationship to mental competence.[5] Therefore, mandatory retirement for judges is completely arbitrary. It denies the judges their rights to individualized determinations of their fitness for service. Removing some of the "unpleasantness" that may accompany such individual determinations has never been considered a legitimate excuse or justification for rank discrimination. The "unpleasantness" rationale fails to justify the mandatory retirement provisions under either a due process analysis (*see infra* pp. 25-29) or an equal protection analysis.

3. *The mandatory retirement scheme does not advance the goal of "preventing harm by senile judges."* As chronological age is unrelated to mental ability, incompetence can

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[5] *See* Brief of American Medical Association, amicus curiae, *Weisbrod v. Lynn*, reproduced in 230 J. A.M.A. 1311, 1312 (1974) ("Chronological age has been observed to have no magic in terms of judgment, ability, and physical dexterity. . . . The granting and continuance of employment opportunities should be based on the individual's competence and ability – not age."); *Age Discrimination in Employment Amendments of 1986*, H. Rep. No. 756, 99th Cong., 2d Sess. 6, reprinted in 1986 U.S. Code Cong. & Admin. News 5628, 5632 (describing psychologists' findings which "revealed little support for the 'somewhat widespread belief that job performance declines with age.' ").

set in at an age much younger than 70, or never. Mandatory retirement at age 70 is an attempt at a Solomonic solution to the problem of determining whether a judge is competent. However, it has the same effect as if Solomon had actually cut the baby in two: it does not solve the problem and it harms innocent and undeserving individuals.[6] It also deprives the public of the valuable judicial services of mature, trained individuals who are prevented from filling out their elected terms and running for retention.

This third rationale suffers from the same infirmity as the second, "unpleasantness," rationale: they each put the rabbit in the hat by assuming judges older than 70 are unfit to serve. At the very least, petitioners should have the opportunity, as the Commonwealth Court ruled, to present a factual record that will disprove this assumption.

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[6] *See* L. Friedman, YOUR TIME WILL COME: THE LAW OF AGE DISCRIMINATION AND MANDATORY RETIREMENT, 99 (1984):

> Undeniably, some old people – judges or whatever – lose their grip. To get rid of them is unpleasant. The judicial system no doubt harbors old fogies and worse. On the other hand, the system also loses when it forces out experienced judges. Justices of the Supreme Court serve for life. A few have stayed on too long (Stephen Field, in the late nineteenth century, was a well-known example). But many judges, including Field, served with great distinction in their 70s and 80s, and Oliver Wendell Holmes, Jr., one of the greatest of the justices, retired just short of his 91st birthday. Would the country be better off if Brandeis, Holmes – or John Marshall – had been forced off the bench at 65 or so?

Finally, it is unclear and unlikely that mandatory retirement actually has the effect of removing any incompetent judges. Therefore, this purported rationale, while a legitimate goal, is not advanced by the mandatory retirement provisions.

4. *There no longer is a "current trend towards mandatory retirement in public and private employment."* The *Malmed II* court, and the state courts below, noted that article V, section 16(b) was enacted on the recommendation of bar associations and other organizations and in conformity with the then "prevailing trend" towards mandatory retirement. Today, most public-minded organizations, including the groups of attorneys who joined petitioners as amici below,[7] have recognized that mandatory retirement does *not* serve a legitimate purpose. In fact, it harms the public interest.

In addition, mandatory retirement is falling out of favor as more employers recognize the lack of a connection between chronological age and fitness. Congress recognized this fact in 1986 when it eliminated the maximum age at which an employee is protected by the ADEA.[8] The House Committee Report accompanying that amendment noted that "There is broad public support for the full elimination of mandatory retirement. . . . The substantial

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[7] Amicus briefs were filed in the Pennsylvania Supreme Court by the Philadelphia Bar Association, the Pennsylvania Defense Institute, and the Pennsylvania Trial Lawyers' Association.

[8] *See* Pub. L. No. 99-592, §§ 2(c), 7, 100 Stat. 3342, 3345 (1986).

opposition to mandatory retirement policies by the American public is one indicator of the strong sentiment against arbitrary age bias in employment." H. Rep. No. 756, 99th Cong., 2d Sess. p. 4, reprinted in 1986 U.S. Code Cong. & Admin. News 5630. The ever-increasing longevity and advances in health care have radically altered notions of when "old age" sets in. According to a study sponsored by the Carnegie Corporation, the nation is undergoing a "longevity revolution." The editor of a report based on this study has written that

> Physical old age, which once began as early as 55 or 60, now does come for many until after age 75. For some people it is postponed even longer, until the 80s or early 90s. This creates a new period in the middle of the life course which does not fit the traditional age span of "middle age," but is not "old" either.

Bronte, *Our Aging Society: A Challenge for the Future,* RESEARCH DIALOGUES No. 14 at 5 (July 1987). As a result of this longevity revolution, a leading medical expert states that "it is necessary to get away from the sovereignty of numbers – whether 70 or 80 or 90 – and apply *individual considerations* as a basis for *rational* and responsible decisions in determining 'functional age.' " Cousins, "Making the Most of Longevity," The Christian Science Monitor, May 2, 1989, at 19 (emphasis added).

Finally, it has never been adequately explained why a "trend" towards mandatory retirement is automatically legitimate. "Everyone else does it" has never been a legitimate rationale for discrimination of any kind in constitutional law.

B. Strict Scrutiny Should Apply Rather Than "Mere Rationality"

Petitioners will argue before this Court that the instant appeal should be examined under a standard of strict judicial scrutiny rather than mere rationality. In *Murgia* this Court based its refusal to find age a suspect classification, with respect to state police, on the premise that:

> While the treatment of the aged in this nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.

427 U.S. at 313-14. The Court did not offer any support for the proposition that the elderly have not experienced a history of purposeful unequal treatment. Petitioners respectfully submit that in fact, "[i]f any group in our society is systematically consigned to the status of 'non-persons,' it is the aged." Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 23 n.122 (1977).

Moreover, it is quite clear that the elderly *have* been subjected to disabilities on account of inaccurate stereotypes. Article V, section 16(b) itself is just one example of discrimination against the aged based on the false assumption that ability declines with age (or disappears upon reaching a certain age). These types of burdens placed on the elderly were the cause for just such statutes as the federal Age Discrimination in Employment Act.

Another factor in determining whether a classification is suspect is whether the disadvantaged group is a "discrete and insular" one, historically denied full protection from the majoritarian political process. This Court in *Murgia* found that this characteristic did not apply to the elderly, because old age is a trait that everyone reaches who lives a normal life span. 427 U.S. at 314. This conclusion fails to account for

> the psychology of youth, and even of middle age. The 'non-old' do not expect to grow old. Of course they know that that fate lies ahead, as an intellectual matter. But as a factor which governs their actions today, it is a reality which is in some manner ignored or suppressed.

Eglit, *Of Age and the Constitution*, 57 CHI.-KENT L. REV. 859, 890 (1981).

Thus, the aged share the characteristics of a suspect class. Unfair and arbitrary distinctions based on age should be subject to *strict constitutional scrutiny.*

Almost ten years have passed since the Court addressed the standard of scrutiny for age distinctions in *Vance*. Petitioners respectfully submit that it is time to review and correct the Court's adoption of the mere rationality standard. The Court lately has been willing to revisit recent decisions on issues as momentous as this one. For example, in *Garcia v. San Antonio Metro. Area Transit Auth.*, 469 U.S. 528 (1985), this Court overruled by name a nine-year-old precedent, *National League of Cities v. Usery*, 426 U.S. 833 (1976). In fact, just last Term, the Court decided *sua sponte* to hear argument on whether *Runyon v. McCrary*, 427 U.S. 160 (1977), should be overruled. *Patterson v. McLean Credit Union*, 485 U.S. 617, 108

S. Ct. 1419 (1988).[9] Meanwhile, there has been a proliferation of cases around the country that have sought a fresh look at this issue.[10]

Applying a heightened degree of scrutiny to age distinctions would not even disturb the results in *Murgia* and *Vance*, as the mandatory retirement provisions at issue in those two cases could have withstood even the strict review petitioners urge the Court to adopt.[11] Petitioners respectfully request that the Court grant the writ and resolve this substantial federal question.

II. PENNSYLVANIA'S SCHEME OF MANDATORY RETIREMENT FOR JUDGES VIOLATES PETITIONERS' RIGHT TO DUE PROCESS OF LAW

Mandatory retirement of state court judges before the end of the terms for which they were chosen by the

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[9] The Court eventually declined to overrule *Runyon. Patterson v. McLean Credit Union*, No. 87-107, slip op. June 15, 1989.

[10] *See, e.g., Hatten v. Rains*, 854 F.2d 687 (5th Cir. 1988), *cert. denied*, 57 U.S.L.W. 3812 (June 12, 1989); *Maresca v. Cuomo*, 64 N.Y. 2d 242, 475 N.E. 2d 95 (1984), *appeal dismissed*, 474 U.S. 802 (1985); *Grinnell v. New Hampshire*, 121 N.H. 823, 435 A.2d 523 (1981); *Malmed v. Thornburgh*, 621 F.2d 565 (3d Cir.), *cert. denied*, 449 U.S. 955 (1980).

[11] See L. Tribe, AMERICAN CONSTITUTIONAL LAW § 16-31 at 1594 n.18 (2d ed. 1988); Eglit, *Of Age and the Constitution*, 57 CHI.-KENT L. REV. 859, 912 (1981) (proposing a heightened standard that would entail "individualized treatment of people, *rather than utilizing the mere rationality approach which ousts the contemplative judge and the academician, along with the police officer and the fire fighter.*") (emphasis added).

electorate subjects those judges to an irrebuttable presumption of incompetence. The ability to serve is not determined by any factor other than the calendar: one day, a judge is qualified to conduct the trial of a person on trial for his or her life, and the next day the judge is not.

The mandatory retirement scheme in Pennsylvania deprives the judge of the right to continue working, of the right to seek the approval of the populace for another term, and of the well-deserved respected status that accompanies the position of judge. Each of these is stripped from the judge because of the assumption that that judge can no longer perform his or her duties.

The reasoning of the district court in *Malmed v. Thornburgh*, 478 F. Supp. 998 (E.D. Pa. 1979), *rev'd*, 621 F.2d 565 (3d Cir.), *cert. denied*, 449 U.S. 955 (1980), is a far superior analysis of this issue than that of the Court of Appeals for the Third Circuit in reversing the district court.

The *Malmed II* court held that mandatory retirement did not impose an irrebuttable presumption because the Commonwealth had put forward four rationales for it, rather than the one rationale that judges become incompetent at age 70. The first such rationale, "increasing judicial manpower," assumes that each new judge will be more productive than each retiring judge. It also rests very heavily on the assumption that judges who retire will choose to keep working on a "senior judge" basis, with diminished compensation and prestige: in other words, it makes sense to force judges to retire because they will keep working anyway. This cannot be uniformly

true. Irrebuttably presuming it to be true for each individual judge violates due process.

The second rationale – avoiding the unpleasantness of removing the incompetent on an individual basis – is inconsistent with the first. If judges are to serve past age 70, even at a reduced level of pay and status, someone has to – and currently does – decide who goes and who stays. There is no evidence that the "unpleasantness" of removing a judge from the bench is any greater than the "unpleasantness" of denying a judge senior status. Nor is there any evidence that judges older than 70 tend to become physically or mentally incapacitated any more frequently than judges who are younger than 70. In fact, there is no evidence on record in this case at all. For that reason, the state Supreme Court decision dismissing this action should be reversed.

The third *Malmed II* rationale, that of preventing harm to the judicial system by senile judges, plainly imposes an irrebuttable presumption that each judge is more likely than not to become senile on his or her 70th birthday. And as for the fourth rationale, the notion that it is currently fashionable (or rather, that it was fashionable in 1968) to force individuals to retire solely because of advancing age is simply not a legitimate state objective.

Each of the rationales mentioned by the Court of Appeals in *Malmed II* assumes one of two things: (1) that the judge who remains fully capable after age 70 is the exception and not the rule; or (2) that mandatory retirement "increases judicial manpower." Petitioners submit that neither of these premises is true. At the very least,

petitioners ask the Court to remand this case so that the accuracy of these assumptions can be tested.

For these reasons as well as those discussed in the previous section (*supra* pp. 18-26), the mandatory retirement scheme bears no rational relationship to any legitimate state purpose.

Finally, there is another reason why the Pennsylvania scheme is repugnant to the due process clause. A position of public employment such as a judicial officer, once granted, is an entitlement that cannot be taken from the holder without some type of due process. *Cf. Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 547 (1985). "Due process" requires at minimum some type of hearing to determine whether depriving the employee of his employment is justified.[12] The process provided for in the challenged sections is not "due"; it is nil. It cannot withstand scrutiny under the due process clause.

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[12] In addressing petitioners' challenge to the mandatory retirement provisions under the Pennsylvania Constitution the state Supreme Court argued that the people if the Commonwealth had the right to set the qualifications of their judicial officers. While this principle may be sound in a general sense, it does not give the people (more than any other public employer) the right to remove a public servant from office without the constitutionally required due process of law. *See Loudermill, supra*, 470 U.S. at 541.

CONCLUSION

For the foregoing reasons, petitioners submit that the Writ of Certiorari should be granted.

Respectfully submitted,

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v.

COMMONWEALTH of Pennsylvania, Appellee/ Respondent at Nos. 49 and 97 Appellant at No. 98.

Supreme Court of Pennsylvania.

Argued Dec. 6, 1988.
Decided March 1, 1989.

Before NIX, C.J., and LARSEN, FLAHERTY, McDERMOTT, ZAPPALA and PAPADAKOS, JJ.

OPINION

NIX, Chief Justice.

Article V, section 16(b) of the Pennsylvania Constitution provides in part that "Justices, judges and justices of the peace shall be retired upon attaining the age of seventy years." Pa. Const. art. V, § 16(b).[1] The instant appeals present us with a question which, at first glance, seems rhetorical: whether the foregoing provision in our state constitution is itself constitutional.

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[1] Article V, Section 16, in its entirety, provides:

§ 16. Compensation and retirement of justices, judges and justices of the peace

(a) Justices, judges and justices of the peace shall be compensated by the Commonwealth as provided by law. Their

(Continued on following page)

This matter began with an original action brought by Harold Gondelman in the Commonwealth Court, seeking a judicial declaration that the mandatory-retirement provision in Article V, section 16(b) is invalid. As the basis for his suit, Gondelman asserted that the age-based retirement provision amounts to impermissible age discrimination, that it therefore violates fundamental liberties guaranteed by the Declaration of Rights set forth in in (sic) the Pennsylvania Constitution.

At the time Mr. Gondelman commenced his action, he was approximately sixty-five years of age. Although Mr. Gondelman is not a judge, but an attorney, his claim of harm was based on the proposition that, should he be appointed or elected to judicial office in 1989, he would be compelled to retire after just three years of service merely because he reached age seventy. According to Gondelman's complaint, the effect of Article V, section 16(b) is to deny to some individuals, solely because of

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(Continued from previous page)

compensation shall not be diminished during their terms of office, unless by law applying generally to all salaried officers of the Commonwealth.

(b) Justices, judges and justices of the peace shall be retired upon attaining the age of seventy years. Former and retired justices, judges and justices of the peace shall receive such compensation as shall be provided by law. No compensation shall be paid to any justice, judge or justice of the peace who is suspended or removed from office under section eighteen of this article or under article six.

(c) A former or retired justice or judge may, with his consent, be assigned by the Supreme Court on temporary judicial service as may be prescribed by rule of the Supreme Court.

Pa. Const. art. V, § 16.

their age, the opportunity of seeking or holding judgeships and enjoying the status and economic benefits that are concomitant to such office. As further support for his assertion that the age provision in Article V, section 16(b) constitutes invidious discrimination, he also contends that in no other branch of state government – executive or legislative – is an elected official compelled to retire at any particular age. In this connection, appellant Gondelman alleged that the challenged provision rests upon an unfounded premise that judicial officers undergo a significant diminution of their work-related capacities upon reaching the age of seventy.

The named defendant, Commonwealth of Pennsylvania, filed preliminary objections which included a demurrer, a challenge to Gondelman's standing, and a challenge to the court's subject matter jurisdiction. Prior to argument on the preliminary objections, four common pleas judges petitioned the Commonwealth Court for leave to intervene in the action as additional parties plaintiff, and were permitted to do so. The intervening judges were the Honorables Leon Katz, Robert A. Wright, John F. Rauhauser, Jr., and James F. Clark (sic). Each of them will reach the age of seventy before the expiration of his current term of office. Desiring to complete the full remainder of their current terms, the intervenors joined in the discrimination challenge to the compulsory-retirement provision in section 16(b) of Article V. In that regard, the intervenors adopted or expanded upon the contentions already advanced by appellant Gondelman; they additionally averred that the age-based retirement mandate violates the Equal Protection and Due Process

clauses in the Fourteenth Amendment of the United States Constitution.[2]

The plaintiffs filed a motion for summary relief, which the court scheduled for argument along with the defendant's preliminary objections. Upon consideration of those matters by the Commonwealth Court sitting *en banc*, the result was an order overruling the preliminary objections and also denying the plaintiffs' motion for summary relief.[3] Regarding the plaintiffs' motion, the Commonwealth Court concluded that they did state a cause of action for having the mandatory-retirement provision declared unconstitutional, but that there existed genuine issues of material fact which precluded summary relief. 550 A.2d 814.

The court's order, although granting the defendant a specified period of time for filing a responsive pleading to the plaintiffs' complaint, set forth the view that the controversy involved a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter. See section 702(b) of the judicial Code, 42 Pa.C.S. § 702(b). We agreed with that view, and accordingly allowed the parties to immediately appeal to this Court for resolution of the central legal question involved.

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[2] Since pendency of this action, additional judges have been permitted to intervene. These additional intervenors are the Honorables Charles A. Lord and William E. Pfadt.

[3] In view of the intervention of the judges, the issue of Gondelman's standing was abandoned.

Although we allowed both sides to appeal, and consolidated their appeals for argument and disposition, we shall for the sake of convenience refer to Gondelman and the intervenors as the "appellants" and to the Commonwealth as "appellee."

As noted, the appellants' challenges to the validity of the retirement provision in Article V, section 16(b) of our state constitution rest upon their argument that the provision amounts to prohibited discrimination, under both the federal constitution and our own state constitution. We commence with the appellants' assertions based on the Equal Protection and Due Process clauses of the Fourteenth Amendment; because, if the challengers are correct in either of those respects, we need not address their arguments which are predicated upon our state constitution.

I.

The essence of the instant complaint is that there has been an arbitrary and discriminatory classification established in our state constitution to the prejudice of older judges. Without regard to the actual physical and mental health of the individual jurist, upon reaching the age of seventy, he is forced to retire on that birthdate. The effect of this mandatory provision is to terminate automatically the elective term which he is serving without consideration for the length of time remaining before its expiration or the mental and physical capacity of the jurist to complete that term.[4] When the judge attains the specified

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[4] This provision does not preclude the jurists from performing judicial duties after reaching the mandatory retirement age. Pa. Const. art. V, § 16(c). Its effect is merely to trigger a vacancy in the particular elected term in which the judge is serving.

age, the office is deemed vacated and the election process to fill that vacancy is triggered. It is asserted that the instant classification created in Article V, section 16(b) of our state constitution violates the equal protection provision of the Fourteenth Amendment of the federal constitution and therefore may not be permitted to stand.

The Supreme Court of the United States has increasingly focused upon the concept of equal protection to guarantee fair treatment to each individual in the exercise of fundamental rights and to assure against distinction based upon impermissible criteria. Since the often repeated quote of Justice Holmes, in *Buck v. Bell*, 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000 (1927), that the concept of equal protection should be considered as "the last resort of constitutional arguments," *Id.* at 208, 47 S.Ct. at 585, the Equal Protection Clause of the Fourteenth Amendment, and the equal protection concept which the Court has infused into the Fifth Amendment's Due Process Clause, have provided the constitutional tools for achieving legal equality among the diverse segments of our society.[5] This equal protection guarantee introduced a

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[5] The concepts of due process and equal protection of the law were intended to be a restraint upon the governmental intrusion on personal liberties secured by the constitution. See the dissenting opinion by Warren, C.J., and Douglas, J. in *Hutcheson v. U.S.*, 369 U.S. 599, 637, 82 S.Ct. 1005, 1025, 8 L.Ed.2d 137 (1962). The Fifth Amendment secured these rights to all citizens against trespass by the federal government. Years later with the enactment of the Fourteenth Amendment those rights became protected against interference by the states.

new concept in our constitutional analysis which governs all governmental actions which classify individuals for deferment benefits or burdens under the law. Unfortunately for the instant appellants, this protection has not been given the sensitivity by a majority of the United States Supreme Court as some of the members of that Court and other legal scholars might wish.

A.

We begin the analysis with the recognition that an obvious discriminatory intent is rarely evident on the face of the statute or regulation. Thus the inquiry must focus upon an examination of the classification made and the proffered legislative purpose. The tighter the fit, the less likely a judicial tribunal will determine that the proferred legislative purpose serves merely as a guise for a discriminatory or arbitrary purpose. In this area judicial tribunals are ever sensitive that they are intruding in the traditional legislative domain of law making. This is a particularly significant concern in the instant appeal where we are focusing not on a legislatively designed classification, but rather on one adopted by the people of this Commonwealth to determine who may serve as judges in their courts. Absent a demonstration of the implication of a fundamental right, *see, e.g., Skinner v. Oklahoma, ex rel. Williamson*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942), or a suspect class, *San Antonio School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), this latter consideration would argue strongly for the least intrusive judicial assessment, which would be to presume the provision to be valid and sustain it if

the classification drawn is rationally related to a legitimate state end. *City of Cleburne, Texas v. Cleburne Living Center,* 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985); *Schweiker v. Wilson,* 450 U.S. 221, 230, 101 S.Ct. 1074, 1080, 67 L.Ed.2d 186 (1981); *United States Railroad Retirement Board v. Fritz,* 449 U.S. 166, 174-175, 101 S.Ct. 453, 459-460, 66 L.Ed.2d 368 (1980); *Vance v. Bradley,* 440 U.S. 93, 97, 99 S.Ct. 939, 943, 59 L.Ed.2d 171 (1979); *New Orleans v. Dukes,* 427 U.S. 297, 303, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511 (1976).

Any concern for a functional separation of powers is, of course, overshadowed if the classification impinges upon the exercise of a fundamental right, or affects a suspect class. *Schweiker v. Wilson,* 450 U.S. 221, 101 S.Ct. 1074, 67 L.Ed.2d 186 (1981); *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978). Appellant judges urge that a higher degree of scrutiny is mandated because the classification discriminates against older judges. It is asserted that the classification in question constitutes age discrimination. The Supreme Court has rejected age as being viewed as a suspect class as of this point in time, *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976); *Vance v. Bradley,* 440 U.S. 93, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979), even though persuasive arguments have been offered to support such a position. *See, e.g., Murgia, supra.* (Marshall, J., dissenting.)

In *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 313-14, 96 S.Ct. 2562, 2567, 49 L.Ed.2d 520 (1976), the Court stated:

> While the treatment of the aged in this nation has not been wholly free of discrimination, such persons,

> unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.
>
> . . . [O]ld age does not define a 'discrete and insular' group, *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152-153, n. 4 [58 S.Ct. 778, 783-784, n. 4, 82 L.Ed. 1234 (1938)], . . . in need of 'extraordinary protection from the majoritarian political process.' Instead, it marks a stage that each of us will reach if we live out our normal span.

In the *Murgia* decision, the majority also expressly rejected "the proposition that a right of governmental employment *per se* is fundamental." *Id.*, 427 U.S. at 313, 96 S.Ct. at 2566, *citing San Antonio School District* 411 U.S. 1, 16, 93 S.Ct. 1278, 1287, 36 L.Ed.2d 16 (1973); *Lindsey v. Normet*, 405 U.S. 56, 73, 92 S.Ct. 862, 874, 31 L.Ed.2d 36 (1972); *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491 (1970).

In a dissenting opinion in *Murgia*, Justice Marshall responded in a persuasive dissent:

> Although we have called the right to work 'of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure,' . . . , the Court finds that the right to work is not a fundamental right. And, while agreeing that 'the treatment of the aged in this nation has not been wholly free of discrimination' the Court holds that the elderly are not a suspect class.
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> *Id.*, 427 U.S. at 317-18, 96 S.Ct. at 2569.

Notwithstanding the appealing tone of this dissent, the majority's position articulated in *Vance v. Bradley*, 440 U.S.

93, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979), leaves little question that a rational basis analysis is the acceptable standard for assessing a forced retirement based solely upon a prescribed age without offending equal protection concerns. In *Vance*, where the Court considered the constitutionality of a maximum retirement age of sixty for Foreign Service officers, the teaching of *Murgia, supra*, was affirmed. The Court in *Vance* reiterated that: a) the aged, as a group, are not entitled to special judicial protection; and b) the rational basis test is the appropriate standard to be applied where a classification is based on age. *Id.*, 440 U.S. at 97, 99 S.Ct. at 943. In determining that the legislative action in *Vance* could be sustained, the court observed:

> Congress was intent not on rewarding youth *qua* youth, but on stimulating the highest performance in the ranks of Foreign Service by assuring that opportunities for promotion would be available despite limits on the number of personnel classes and on the number of positions in the Service. Aiming at superior achievement can hardly be characterized as illegitimate, and it is equally untenable to suggest that providing promotion opportunities through the selection-out process and through early retirement does not play an acceptable role in the process. *Id.* at 101, 99 S.Ct. at 944.
>
> . . . Because Congress desired to maintain the competence of the Foreign Service, the mandatory retirement age of 60 rationally furthers its legitimate objective. . . .
>
> *Id.* at 108-09, 99 S.Ct. at 948.

Significantly, the Court further stated "[e]ven if the classification involved is to some extent underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that in a case like this

'perfection is by no means required.' " *Id.* at 108, 99 S.Ct. at 948 (Citations omitted).

We are therefore constrained to conclude that neither the appellant judges nor the amici[6] have offered a legitimate basis, in view of the decisions of the U.S. Supreme Court, to justify employing a heightened scrutiny of the alleged discriminatory and/or arbitrary nature of the instant provision.

B.

The same provision was called to task with the identical challenges as presented in this appeal in *Malmed v. Thornburgh*, 621 F.2d 565 (3rd Cir.), *cert. denied*, 449 U.S. 955, 101 S.Ct. 361, 66 L.Ed.2d 219 (1980). That court applying the rational basis test concluded that an equal protection challenge could not be sustained. The Circuit Court opinion was in response to a District Court finding that Article V, section 16(b) conflicts with the equal protection accorded under the Fourteenth Amendment of the United States Constitution. In rejecting the District Court's assessment, the Circuit Court properly noted that a court may even hypothesize the motivations of the enacting body to find a legitimate objective promoted by the challenged provision. *See, e.g., Weinberger v. Salfi*, 422 U.S. 749, 780, 95 S.Ct. 2457, 2474, 45 L.Ed.2d 522 (1975); *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 487-90, 75 S.Ct. 461, 464-66, 99 L.Ed. 563 (1955). In any event, the Circuit

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[6] Amici, the Pennsylvania Trial Lawyers Association and the Pennsylvania Defense Institute, argue that the mandatory retirement provision is illegal age discrimination, violative of the United States Constitution. Amicus, the Philadelphia Bar Association, incorporates this assertion into its argument by adopting the arguments of the appellant judges.

Court noted the reasons for this provision were clearly articulated during the convention and offered to the public in securing their vote for this amendment.[7] These reasons were quoted in the opinion of the Third Circuit, *Malmed*, 621 F.2d at 567-69, and repeated in the opinion of the Commonwealth Court in this appeal. Those reasons have not been, nor can they be, challenged on the ground that they do not have a reasonable relationship to a legitimate state purpose. *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491 (1970).

> If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 [31 S.Ct. 337, 340, 55 L.Ed. 369 (1911)]. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations – illogical, it may be, and unscientific.' *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70 [33 S.Ct. 441, 443, 57 L.Ed. 730 (1913)]. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan v. Maryland*, 366 U.S. 420, 426 [81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961)].

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[7] Article V, section 16(b), was the result of many hours of thoughtful discussion and debate by the Judiciary Subcommittee of the Preparatory Committee for the Constitutional Convention in Pennsylvania in 1967-68. Reference Manual No. 5 prepared by that Judiciary Subcommittee cited the following arguments in support of mandatory retirement at a specified age:

- substantially increases judicial manpower when a plan for part-time post-retirement service exists. By continually

(Continued on following page)

The Commonwealth Court in overruling the preliminary objections concluded that appellants could prevail if they were successful in proving that the stated objectives of Article V, section 16(b), failed to accomplish the intended purpose. The Commonwealth Court relied upon the allegations that the experience following the adoption of Article V, section 16(b), has demonstrated that the provision did not serve the purposes it was intended to

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bringing in younger judges while retaining the part-time services of willing and able retired judges, a system of mandatory retirement plus post-retirement service helps solve the pressing problem of court congestion and delay. As mentioned previously, Pennsylvania already has provided for voluntary post-retirement service.

• eliminates unpleasantness of removing aged and disabled judges on an individual selective basis. Mandatory retirement is more impersonal than individual removal; everyone is treated alike. The difficulty and unpleasantness of determining which judges are senile and which are not is largely avoided.

•prevention of harm by few senile judges more than offsets loss of judges who retain full powers past normal age. Besides, the services of able retired judges may be secured by a provision for post-retirement service.

•corresponds with current trend towards mandatory retirement in other public and private employments. There appears to be no good reason why judges should be treated differently from other public officials, teachers, executives, and other professional people who are subject to compulsory retirement. Judiciary Subcommittee of the Preparatory Committee for the Pennsylvania Constitutional Convention, Reference Manual No. 5 at 203-04 (1968).

achieve. Contending that this created a material issue of fact as to whether there was a reasonable relationship to a legitimate state interest, the Commonwealth Court overruled the preliminary objections and directed that appellants should have an opportunity to prove their contentions. Illustrative of the allegations sought to be proven were: a) that actuarial tables showing normal life expectancies and studies demonstrating the "normal age" to which there is retention of full mental powers in 1988 could be used as evidence to refute the premise that age seventy is past the normal age at which "full powers" are retained; b) that there is no longer a trend to use mandatory retirement ages in public or private employment; c) that the concept of senior judge status has proven to be unsatisfactory and degrading and therefore does not serve to build a reserve of judicial manpower;[8] and, d) that the experience of the Judicial Inquiry and Review Board has established that it can effectively protect the system on an individual basis from incompetent jurists, which is more desirable than an overinclusive prophylactic approach.

Accepting, for the consideration of this contention, that these positions could be established, they would not be relevant to the constitutional analysis presented. In applying the equal protection concept of the Fourteenth Amendment, the United States Supreme Court made

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[8] It is significant to note that this assertion raised by appellants is not constitutionally based. The senior judge status is regulated by the Pennsylvania Rules of Judicial Administration of the Supreme Court, *see*, Pa.R.J.A. No. 701, and therefore, the Supreme Court is the appropriate body to amend such rules if they are determined to be unsatisfactory.

clear that we must seek only the assurance that the intent of the classification at issue bears some fair relationship to a legitimate public purpose. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973); *Madden v. Kentucky*, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940). If the selected method is not the most effective or efficient method to achieve the State objective, the people may remedy that by amending that provision.[9] *See Mayhugh v. Coon*, 460 Pa. 128, 331 A.2d 452 (1975); *Cali v. City of Philadelphia*, 406 Pa. 290, 177 A.2d 824 (1962); *Appeal of Obradovich*, 386 Pa. 342, 126 A.2d 435 (1956).

The argument that classifications premised upon old age should not be accorded a heightened scrutiny is admittedly founded upon the simplistic premise of the universal quality of that status. Notwithstanding the myriad of differences that exist within our society, we all will share the experience, if we have the good fortune to enjoy longevity. Thus it is assumed that the majoritarian tendency to trammel upon the rights of the minority or to ignore its particular needs would not be applicable to such a group. The questionable assumption is whether this affinity is necessarily fully appreciated in the earlier

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[9] Appellants have offered many thoughtful reasons why the age 70 limit should be reconsidered. This opinion is not to be construed as a rejection of these arguments, but merely a recognition that the body that should make that decision is the people of the Commonwealth of Pennsylvania.

stages of our lives. Notwithstanding this legitimate philosophical issue, federal precedent is clear that the standard of rationality satisfies the inquiry in this area.[10] In reaching this conclusion we are reminded of the words of Judge Goldberg in a similar setting:

> I write today, at 82 years of age, with a heavy pen and an even heavier heart. The Honorable Judge William Hatten has served his district ably for over 20 years. His ample competence is stipulated by all parties. Yet today we are compelled by precedent to inform Judge Hatten that he may not be a candidate for reelection, simply because, tomorrow, he will celebrate his seventy-fifth birthday.
>
> I sincerely wish that our birthday message could be a happier one. However, the people of Texas have chosen youth over wisdom, and we are not free to meddle with their choice: the district court heard unrebutted evidence that judicial ability declines with age; and, more importantly, the Supreme Court has spoken twice, though summarily, in cases with virtually identical facts.
>
> Though there is some merit to Judge Hatten's argument that Art. V, § 1-a, violates fundamental . . . rights, our hands are tied by the Supreme Court. Perhaps unfolding years will open eyes that are now closed. Until then we are bound by precedent to affirm.
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> *Hatten v. Rains*, 854 F.2d 687, 689-90 (5th Cir.1988). (Footnotes omitted.)

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10 The Circuit Courts have affirmed on this issue in several decisions. *E.g., Malmed v. Thornburgh*, 621 F.2d 565 (3rd. Cir.), *cert. denied*, 449 U.S. 955, 101 S.Ct. 361, 66 L.Ed.2d 219 (1980); *Trafelet v. Thompson*, 594 F.2d 623 (7th Cir.), *cert denied*, 444 U.S. 906, 100 S.Ct. 219, 62 L.Ed.2d 142 (1979); *Rubino v. Ghezzi*, 512 F.2d 431 (2d Cir.), *cert. denied*, 423 U.S. 891, 96 S.Ct. 187, 46 L.Ed.2d 122 (1975).

II.

Having concluded that Article V, section 16(b) does not offend a federally protected right, we now turn to the interesting argument raised by appellants which calls upon us to conclude that this provision is in conflict with the Declaration of Rights set forth in Article I of the constitution of this Commonwealth. The argument begins with the provision that Article I, section 1 of our constitution guarantees all citizens of the Commonwealth equal protection of the laws. This section provides:

> **§ 1. Inherent rights of mankind**
>
> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

Pa. Const. art. I, § 1.

It is then noted that this section is reinforced by Article I, section 26 which provides:

> **§ 26. No discrimination by Commonwealth and its political subdivisions**
>
> Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.

Pa. Const. art. I, § 26.

Premised upon the conclusion that Article I sets up a standard to which the other articles of our constitution must comply, it is argued that any provision of our constitution must be recognized as being subordinate to the

mandate of Article I and interpreted in accordance therewith.[11] This theory recognizes that we in this Commonwealth in dispensing the reservoir of power consigned to the states under our system of federalism, *see, Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (1936); *United States v. Sprague*, 282 U.S. 716, 51 S.Ct. 220, 75 L.Ed. 640 (1931), have determined that the rights articulated in Article I are to be recognized as being inherent in the right of a resident of this Commonwealth and insulated against the governmental power of this Commonwealth. As explained by this Court in *Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life Insurance Co.*, 512 Pa. 23, 28-29, 515 A.2d 1331, 1334 (1986):

> The primary purposes of a constitution are to establish a government, define or limit its powers and divide those powers among its parts. U.S. Const. amend. X; J. Nowak, R. Rotunda, and J. Young, *Constitutional Law*, 121 (2d Ed.1983). *See generally* 16 Am.Jur.2d, *Constitutional Law*, § 6 (1979). The United

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[11] It has been recognized that Article I, sections 1, 9 and 26 combine to provide the counterpart of the federal due process and equal protection provisions. As noted by Judge Woodside:

> Article 1, § 9, of the Constitution of Pennsylvania provides: 'Nor can an accused be deprived of his life, liberty or property unless by the judgment of his peers or the law of the land.' Sections 1 and 26, along with Section 9, provides for 'due process' and 'equal protection' generally, although not in language as specific as the Fourteenth Amendment. *See*, R. Woodside, Pennsylvania Constitutional Law at 21 (1985).

States Constitution established a government of limited and enumerated powers. Consequently, the national government possesses only those powers delegated to it. J. Nowak, *supra*, at 121. *See generally* 16 Am.Jur.2d at § 278. State constitutions, on the other hand, typically establish governments of general powers, which possess all powers not denied by the state constitution. J. Nowak, *supra*, at 121. *See generally* 16 Am.Jur.2d at § 16. Our state constitution functions this way and restrains these general powers by a Declaration of Rights. R. Woodside, *supra*, at 3, 113; *Commonwealth v. Wormser*, 260 Pa. 44, 46, 103 A. 500, 501 (1918) (the legislature may enact all laws not forbidden by the state constitution).

We agree with the general proposition that those rights enumerated in the Declaration of Rights are deemed to be inviolate and may not be transgressed by government. *Spayd v. Ringing Rock Lodge No. 665, Brotherhood of Railroad Trainmen*, 270 Pa. 67, 113 A. 70 (1921). The concept of the sanctity of those rights set forth under Article I is expressly articulated in Article I, section 25 which provides:

> **§ 25. Reservation of powers in people**
>
> To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.

Pa. Const. art. I, § 25.

Thus appellants' argument would be convincing if its focus was directed at a legislative enactment, an executive regulation or a judicial decision. Here however the challenge relates to a pronouncement of the people. Clearly Article V, section 16(b), comes from the same source as the rights enumerated in Article I. It is absurd

to suggest that the rights enumerated in Article I were intended to restrain the power of the people themselves. Such a proposition loses sight of "the basic overriding principle of American government – that all power is in the people." R. Woodside, Pennsylvania Constitutional Law (1985):

> The Constitution sets forth those rights and powers inherent in the people that are delegated to government and those powers which are reserved and retained by the people. In a sense, it is a power of attorney by the people to their designated officials acting as agents for the people and delineating the authority granted and the rights reserved. The provisions of a constitution specifying the rights reserved and retained by the people are generally referred to as the 'Bill of Rights,' or in Pennsylvania the 'Declaration of Rights.'
>
> *Id.* at 3.

The sacrosanct quality appellants would have us ascribe to Article I does not further the purposes of the argument they seek to advance. To the contrary, it undercuts their position.

Accepting their premise that within the penumbra of rights articulated in Article I, the right to classify based upon age was withheld from government, such an action would signify that the people had determined that *government* should be precluded from making such a classification. Unless there is a federally protected right offended, the people, by way of amendment, are free to convey a power to their government if they choose to do so. *Stander v. Kelley*, 433 Pa. 406, 250 A.2d 474 (1969). This view is reinforced by Article I, section 2, which provides:

§ 2. Political Powers

All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness. For the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper.

Pa. Const. art. I, § 2.

Section 2 expressly recognizes the inherent power of the people reserved in Article I as well as their "indefeasible right to alter, reform or abolish their government in such manner as they may think proper." Clearly within the reservoir powers embraced within Article I is the right of the people to determine the conditions under which those entrusted with dispensing the judicial power of the Commonwealth shall serve. Moreover, the people, from time to time, may determine it to be in the best interest of this Commonwealth to change or alter those qualifications. The instant challenged classification as to age merely represents this type of action.

The restraint imposed under Article I is not upon the people in forming their government, but rather upon the government in the discharging of its functions under the direction of that constitution. Restated, Article I does not restrain the power of the people, it restrains the governmental structure that the people have created. Thus even if the appellants are correct in their assertion that implicit in the various provisions of Article I there is a prohibition against classifications predicated upon age, such a prohibition would only restrain governmental classifications, but would not prevent the people from using such

classifications in structuring the government itself.[12] Article V, section 16(b), does not represent governmental action, but rather is a product of the people in the structuring of their government. Thus the fundamental fallacy of appellants' argument is the failure to distinguish between the power of the people and the actions of the government created by the people. In forming the government of this Commonwealth, the only restraint upon the people is that imposed under our federal constitution. Having determined that the challenged classification does not offend federal constitutional mandate, it cannot be said that the people of this Commonwealth could not be permitted to employ such a classification.

Accordingly, the Commonwealth's preliminary objections are sustained and the action is dismissed.

STOUT, J., did not participate in the consideration or decision of this case.

PAPADAKOS, J., files a dissenting opinion.

PAPADAKOS, Justice, dissenting.

Although I fully understand the rationale used by Mr. Chief Justice Nix in deciding that the people of Pennsylvania have the right and power to discriminate against themselves on the basis of age, I must dissent because I believe that the expansion of fundamental civil rights by our enlightened courts in the recent past now mandates that the right to be free from discrimination on the basis of age is a fundamental civil right that is protected by

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[12] In view of our decision, we need not determine if in fact there is a prohibition against governmental classifications based on age.

Article I, Section 26 of our Pennsylvania Constitution wherein it states:

> § 26. *No Discrimination by Commonwealth and its political subdivisions.*
>
> Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.

The majority make much of the fact that Article I, Section 26, restricts discriminatory actions by *government* and does not prevent the people, in whom ultimate power reposes, from exercising any and all forms of discrimination not prohibited by the Federal Constitution. Perhaps such an analysis is true under certain conditions. But I believe it is not relevant to this case.

Article V, Section 16 of our Constitution provides, in relevant part.

> (a) Justices, judges and justices of the peace *shall be retired* upon attaining the age of seventy years. . . . (Emphasis added).

This section does not say that jurists shall retire; rather, they *shall be retired* – who is to effect the retirement of jurists if it is not *government?* I read this section as imposing upon *government* the obligation of removing jurists from office solely on the basis of age. Such action by *government*, as admitted by the majority, is prohibited by Article I, Section 26 of the Pennsylvania Constitution which is, in effect, part of the Bill of Rights of all of the people.

Harold GONDELMAN, on his own behalf and on behalf of all others similarly situated, Petitioner,

v.

COMMONWEALTH of Pennsylvania, Respondent.

Commonwealth Court of Pennsylvania.

Argued Oct. 5, 1988.
Decided Nov. 3, 1988.

Before CRAIG, DOYLE, COLINS, PALLADINO, McGINLEY and SMITH, JJ.

OPINION IN SUPPORT OF DENYING SUMMARY RELIEF AND OVERRULING PRELIMINARY OBJECTIONS

PALLADINO, Judge.

Harold Gondelman filed a petition for review, in the nature of a complaint for declaratory judgment, in this court's original jurisdiction. Gondelman seeks to have this court declare unconstitutional section 16(b) of article V of the Pennsylvania Constitution, which mandates retirement of all judges at age 70.[1] The Commonwealth responded to this petition by filing preliminary objections containing two objections. One objection challenges this court's subject matter jurisdiction to consider Gondelman's petition on the basis that Gondelman, because he is

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[1] This section states, in pertinent part that: "Justices, judges and justices of the peace shall be retired upon attaining the age of 70 years."

not currently a judge nor running for election, does not have standing to raise the constitutionality of the mandatory retirement of judges at age 70. The other objection is in the nature of a demurrer and alleges that the petition fails to state a cause of action upon which relief can be granted.

Prior to argument on the preliminary objections, Judge Leon Katz of the Court of Common Pleas of Philadelphia County and Judge Robert A. Wright of the Court of Common Pleas of Delaware County (Intervenors) sought permission to intervene in this action. Both the Commonwealth and Gondelman consented to the intervention; this court granted permission to intervene. Gondelman and Intervenors (Petitioners) then filed a motion for summary relief which was scheduled for argument with the preliminary objections.

Intervenors are judges who will reach the age of 70 before the expiration of their terms of office. At oral argument the Commonwealth indicated that because of the intervention it would not pursue the preliminary objection to subject matter jurisdiction. The matters which are before us for resolution, therefore, are whether the petition states a cause of action and if so, whether, as a matter of law, section 16(b) of article V of the Pennsylvania Constitution is unconstitutional. For the reasons which follow, we would propose to overrule the Commonwealth's preliminary objections and deny Petitioners' motion for summary relief.

Initially we note that a preliminary objection in the nature of a demurrer will be sustained only where the complaint is clearly insufficient to establish any right to relief and any doubt must be resolved in favor of the pleader. *County of Allegheny v. Commonwealth of Pennsylvania*, 507 Pa. 360, 490 A.2d 402 (1985). On the other hand, summary relief[2] may not be granted unless the moving party is entitled to judgment as a matter of law. *See Aiken v. Radnor Township Board of Supervisors*, 83 Pa.Commonwealth Ct. 190, 476 A.2d 1383 (1984). For summary relief to be granted it must be clear that there are no issues of material fact and any doubt must be resolved in favor of the non-moving party. *See Wolgemuth v. Kleinfelter*, 63 Pa.Commonwealth Ct. 395, 437 A.2d 1329 (1981).

Petitioners challenge the constitutionality of article V, section 16(b) of the Pennsylvania Constitution under the Pennsylvania and United States Constitutions. Two challenges are made under the Pennsylvania Constitution. The first is that mandatory retirement of judges at age 70 violates the guarantees of article I, section 1.[3] The second

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[2] Summary relief in this case was properly sought pursuant to Pa.R.A.P. 1532(b). The official note to this rule indicates that it is a generalization of Pa.R.C.P. No. 1098 (peremptory judgment).

[3] Section 1 states:

All mean are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

is that mandatory retirement discriminates against judges in the exercise of a civil right in violation of article I, section 26.[4] The challenge under the United States Constitution is that mandatory retirement of judges at age 70 violates the equal protection and due process clauses of the fourteenth amendment.[5] Additionally, Intervenors allege that the mandatory retirement of judges at age 70 violates the Federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634. We will address the viability of each of these challenges in the following order: (1) Pennsylvania Constitution; (2) ADEA; (3) United States Constitution.

I. PENNSYLVANIA CONSTITUTION

Article V, section 16(b) of the Pennsylvania Constitution, mandating retirement of judges at age 70, was adopted by the electors of Pennsylvania on April 23, 1968.[6] The challenges to the constitutionality of the

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[4] Section 26 states:
Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.

[5] The Fourteenth amendment, in pertinent part, states:
No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[6] On April 23, 1968, the electors repealed article V of the Pennsylvania Constitution of 1874 and adopted a new article V.

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mandatory retirement of judges at age 70, Pa. Const. art. V, § 16(b), based on article I, sections 1 and 26, are premised on an assertion that the rights in article I have "superior mandatory force" and prevail over provisions contained in the remainder of the Pennsylvania Constitution. As authority for this argument, article I, section 25 of the Pennsylvania Constitution is referenced. This section states:

> To guard against transgressions of the high powers which we have delegated, we declare that everything in this Article is excepted out of the general powers of government and shall remain inviolate.

It is contended that the "general powers of government" include those provisions in the remainder of the Pennsylvania Constitution. We can not agree. *Armstrong v. King*, 281 Pa. 207, 126 A. 263 (1924), is cited in support of the proposition that article I, section 25[7] elevates article I to a superior position over the other provisions of the Pennsylvania Constitution. However, the Pennsylvania Supreme Court in *Armstrong* was not determining whether article I was of superior force. The issue before

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Article V deals with the judicial branch of the government. The current Pennsylvania Constitution is referred to as the Constitution of 1968 because the numerous changes adopted by the people in 1968 were the result of a Constitutional Convention.

[7] The provision currently found at article I, section 25 of the Pennsylvania Constitution of 1968 was, at the time of the *Armstrong* decision, in article I, section 26 of the Pennsylvania Constitution of 1874.

the court in *Armstrong* was whether a constitutional provision limiting the submission of constitutional amendments to no "oftener than once in five years" prohibited the advertisement of an amendment for submission to the electors on November 4, 1924 because a constitutional amendment had been submitted and approved on November 6, 1923.[8] The court held that this provision was to be followed and prohibited the submission of the proposed amendment to the electors in 1924. The court stated that the five year provision could not be used to challenge a constitutional amendment after it had been voted on and approved by the required majority of the electors. The supremacy of article I over the remainder of the constitution was not at issue.

The supremacy of article I over another portion of the Pennsylvania Constitution, using the proposition now set forth in article I, section 25, was raised in *Collins v. Commonwealth*, 262 Pa. 572, 106 A. 229 (1919). At issue in *Collins* was the constitutionality of the Act of May 10, 1917, P.L. 159, which permitted Ida Collins to bring suit against the Commonwealth for damages that might be due as a result of the death of her husband while driving on a state highway. Article III, section 7 of the Pennsylvania Constitution of 1874 prohibited the General Assembly

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[8] Article 18 of the Pennsylvania Constitution of 1874. This provision may be found in article XI, section 1 of the Pennsylvania Constitution of 1968. Article XI, section 2, however, contains an exception to this prohibition in the event of emergency but requires agreement by two-thirds of each house of the General Assembly, rather than a majority, before the proposed amendment may be published and submitted to the qualified electors of the Commonwealth.

from passing a special law "regulating the practice or jurisdiction of, or changing the rules of evidence in any judicial proceeding." Article I, section 11 of the Pennsylvania Constitution of 1874 provided, in pertinent part, that "[s]uits may be brought against the commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct."

Collins argued that the special law permitting her to sue the Commonwealth could not be held unconstitutional under article III, section 7 because article I, section 11 permitted the General Assembly to allow suit and, because of article I, section 26,[9] that right could not be restricted. The Pennsylvania Supreme Court, while noting that article I, section 26 might give the article I sections containing those "inalienable rights expressly reserved to the people" a special significance, held that "section 26 does not give to the clause quoted from section 11 an independent position in our scheme of government, but leaves it to be construed in connection with all other relevant constitutional provisions." 262 Pa. at 576, 106 A. at 231.

More recently the Pennsylvania Supreme Court has considered the impact of article I in the Pennsylvania Constitution, although not in connection with its supremacy over another constitutional provision. In *Western Pennsylvania Socialist Workers v. Connecticut General Life Ins. Co.*, 512 Pa. 23, 28-29, 515 A.2d 1331, 1334 (1986), the court describes a constitution, and the Pennsylvania Constitution in particular, as follows:

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[9] *See supra* note 7.

> The primary purposes of a constitution are to establish a government, define or limit its powers and divide those powers among its parts. . . . State constitutions . . . typically establish governments of general powers, which possess all powers not denied by the state constitution. . . . Our state constitution functions this way and restrains these general powers by a Declaration of Rights [Article I]. (Citations omitted.)

The supreme court noted that the provision found in article I, section 25 has, without material change, been a part of the Pennsylvania Constitution since 1776 and that it acts to "limit our state government's general power." *Id.* at 30, 515 A.2d at 1335.

We conclude that the effect of article I, section 25 is not to raise article I to a superior position over the remainder of the Pennsylvania Constitution. Rather, its effect is to prohibit the government, defined by the remainder of the Constitution, from acting in any manner to limit or restrain those rights set forth in article I. This concept has been aptly described as follows:

> [A] declaration of rights as we have called it in Pennsylvania, is a designation of the recognized inherent private rights of an individual which are protected against infringement by government. The declarations are prohibitions and restrictions of the powers of officials which they must accept and follow. When the people, through their frame of government, gave power to the General Assembly, officials and agencies of government, they reserved from those powers the designated rights of the individual. A right . . . is reserved by all people only in the sense that it is reserved by each person. "All" the people, except by constitutional amendment, cannot deny one person of any of these rights. They cannot do it through their officials, their legislators, or by direct action such as initiative or referendum.

Woodside, Pennsylvania Constitutional Law 113 (1985). Article I has never been used to invalidate another provision of the Pennsylvania Constitution. We now hold that one part of the Pennsylvania Constitution may not be used to challenge the constitutionality of another part of that same constitution. Therefore, the constitutional challenges to article V, section 16(b) based on article I, sections 1 and 26 do not state a cause of action upon which relief can be granted.

II. ADEA

Section 4(a)(1) of ADEA, 29 U.S.C. § 623(a)(1), states, in pertinent part, that "[i]t shall be unlawful for an employer to . . . discharge any individual or otherwise to discriminate against any individual . . . because of such individual's age." Section 12(a), 29 U.S.C. § 63(1)(a), states that the prohibitions in ADEA are "limited to individuals who are at least 40 years of age."[10] The Commonwealth contends that Intervenors can not state a cause of action based on ADEA because section 11(f), 29 U.S.C. § 630(f), excludes elected judges from the protection against age discrimination in ADEA.

Section 11(f) states, in pertinent part:

> The term "employee" means an individual employed by an employer except that the term "employee" *shall*

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[10] ADEA was made applicable to states as employers by amendment in 1974. Pub.L. No. 93-259 § 28(a)(1)-(4), 88 Stat. 78 (1974). When enacted, section 631(a) contained an upper age limit. Pub.L. No. 90-202, § 12, 81 Stat. 607 (1967). The upper age limit was eliminated from section 631(a) in 1986. Pub.L. No. 99-592, § 2(c), 100 Stat. 3342 (1986).

> *not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof,* or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

29 U.S.C. § 630(f) (emphasis added). Pennsylvania courts have not addressed the issue of whether Pennsylvania judges are excluded from the protection of ADEA. Other jurisdictions have addressed the effect of ADEA on state constitutional provisions mandating retirement of judges at age 70.

The Massachusetts Constitution provides that all judges in the Commonwealth of Massachusetts are to be chosen by appointment of the governor, Mass. Const. part II, c. 2, § 1, art. 9, and must retire at age 70. *Id.*, c. 3, art. 1. The mandatory retirement at age 70 provision was challenged as being invalid because it conflicted with ADEA. The Supreme Judicial Court of Massachusetts in *Apkin v. Treasurer,* 401 Mass. 427, 517 N.E.2d 141 (1988), held that because the United States Congress did not clearly express an intention to apply ADEA to appointed state judges, ADEA did not preempt the Massachusetts constitutional provision mandating retirement of judges at age 70. In *EEOC v. Commonwealth of Massachusetts,* 680 F.Supp. 455 (D.Mass. 1988), a federal district court also reached

the conclusion that ADEA did not invalidate the Massachusetts constitutional provision requiring retirement of judges at age 70. The basis of the federal district court's decision was that the exception clause in section 630(f) had to be interpreted as including all state judges, whether elected or appointed, because of the policy making position of judges in state government. *Id.* at 462.

The New York Constitution also mandates retirement of judges at age 70. N.Y. Const. art. VI, § 25. The New York Constitution provides that judges of some of the New York courts shall be appointed while others are to be elected.[11] When section 12 of ADEA was amended in 1986 to remove any upper age limit to its protection, the Administrative Board of the Office of Court Administration in New York determined that ADEA was not applicable to elected judges but did prohibit appointed judges from being forced to retire prior to the expiration of their appointive terms. A number of elected judges filed a declaratory judgment action seeking to have the constitutional provision mandating retirement declared invalid on the basis that the Administrative Board's interpretation of ADEA resulted in a violation of the due process

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[11] Justices of the New York Court of Appeals are appointed by the governor. N.Y. Const. art. VI, § 2. Justices of the New York Supreme Court are elected. *Id.*, § 4. Judges of the New York Court of Claims are appointed by the governor. *Id.*, § 9. Judges of New York County, Surrogate's, Family and District Courts are elected. *Id.*, §§ 10, 12, 13, 16. Judges of the civil division of the New York City Court are elected while those of the criminal division are appointed by the mayor. *Id.*, § 15. Judges of local courts outside New York City are elected if it is a town court and chosen as the legislature shall so direct in cities. *Id.*, § 17.

and equal protection clauses of the fourteenth amendment of the United States Constitution. The Court of Appeals of New York in *Diamond v. Cuomo*, 70 N.Y. 2d 338, 520 N.Y.S.2d 732, 514 N.E.2d 1356 (1987), *appeal dismissed*, ___US.___, 108 S.Ct. 2008, 100 L.Ed.2d 597 (1988), held that disparate treatment of elected and appointed judges did not make the mandatory retirement provision invalid because the reasons for mandating retirement, while partially frustrated, were not irrational.[12]

Intervenors make a different ADEA argument than those asserted in New York and Massachusetts. Intervenors contend that they are not elected to "public office" within the meaning and intent of section 630(f) and, therefore, are not exempted from ADEA protection. Intervenors support this novel proposition by arguing that (1) the duties of judges are different than those of public officers in the other two branches of government and (2) the method provided in the Pennsylvania Constitution for removing judges is different from that for removing legislators and elected executive officers.[13] We are unpersuaded by Intervenors' argument.

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[12] In *Maresca v. Cuomo*, 64 N.Y.2d 242, 485 N.Y.S.2d 724, 475 N.E.2d 95 (1984), *appeal dismissed*, 474 U.S. 802, 106 S.Ct. 34, 88 L.Ed.2d 28 (1985), the Court of Appeals of New York rejected a facial challenge to the constitutionality of the New York Constitution provision requiring retirement of judges at age 70, based on the equal protection and due process clauses of the fourteenth amendment of the United States Constitution. The court applied the rational basis test and found the provision rationally related to legitimate state objectives.

[13] Intervenors focus on the fact that judges, after their first elected term expires, run unopposed for retention for another

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Public office is defined in Black's Law Dictionary 1107 (5th ed. 1979), in pertinent part, as follows:

> Essential characteristics of "public office" are (1) authority conferred by law, (2) fixed tenure of office, and (3) power to exercise some portion of sovereign functions of government; Key element of such test is that officer is carrying out sovereign function. . . . Essential elements to establish public position as "public office" are: position must be created by constitution, . . . portion of sovereign power of government must be delegated to position, . . . duties must be performed independently without control of superior power other than law, and position must have some permanency and continuity.

There can be no doubt that the office of judge is a public office. The position is created by the constitution, judges have a fixed tenure of office, and judges most certainly perform a sovereign function of government. The fact that the type of government function performed by judges differs from that performed by members of the legislature or officials of the executive branch does not make the position of judge any less of a public office. Neither does the fact that the Pennsylvania Constitution provisions dealing with removal treat the judiciary different from the legislative and executive branches. Examination of the Pennsylvania Constitution shows numerous

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term, Pa. Const. art. V, § 15, while legislators and elected officers do not have that option. They also cite the fact that judges, unlike legislators and elected executive officers, may be removed from office by the Pennsylvania Supreme Court on its own initiative or by recommendation of the Judicial Inquiry and Review Board. *Id.*, § 18.

differences among all three branches of government.[14] These differences do not make the position of judge any less a public office than that of governor or legislator.

Elected judges in Pennsylvania are clearly excluded from the protection of ADEA by the exception clause of section 630(f). Intervenors can not state a cause of action challenging the constitutionality of the mandatory retirement provision of the Pennsylvania Constitution on the basis of ADEA.

III. UNITED STATES CONSTITUTION

The constitutionality of the mandatory retirement of judges at age 70, Pa. Const. art. V, § 16(b), is also challenged on the basis that it violates the due process and equal protection clauses of the fourteenth amendment of the United States Constitution. The due process violation is premised on the "irrebuttable presumption" doctrine. Petitioners' argument is that mandatory retirement at age 70 presumes that judges over that age are incompetent

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[14] There are many differences created by the Pennsylvania Constitution among the three branches of government. These include: Individuals must be 21 years old to be elected as a representative and 25 years old to be elected as a senator. Pa. Const. art. II, § 5. The governor, lieutenant governor and attorney general must be 30 years old. *Id.* art. IV, § 5. The attorney general must be a member of the Pennsylvania bar. *Id.* There is no age requirement for judges; however, all except district justices must be members of the Pennsylvania bar. *Id.* art. V, § 12. Legislators are elected for two years, *id.* art. II, § 2, the governor for four years and is permitted no more than two terms *id.* art. IV, § 4, and judges, excluding district justices, for ten years. *Id.* art. V, § 15.

and this presumption violates due process because judges over age 70 are deprived of their positions without having been given an opportunity to prove their competence. The equal protection violation argument is that judges over age 70 are treated differently than those under age 70 for no legitimate reason, or if there is a legitimate reason, mandatory retirement at age 70 is an irrational means of achieving the objective sought.

Identical legal arguments were made by a group of five Pennsylvania trial judges in a declaratory judgment suit brought in federal district court in 1978. The district court agreed with the judges on both the due process and equal protection argument. *Malmed v. Thornburgh (Malmed I)*, 478 F.Supp. 998 (E.D.Pa.1979). However, the Third Circuit Court of Appeals reversed. *Malmed v. Thornburgh (Malmed II)*, 621 F.2d 565 (3d Cir.), *cert. denied*, 449 U.S. 955, 101 S.Ct. 361, 66 L.Ed.2d 219 (1980). The Commonwealth, while acknowledging that this court is not bound by the Third Circuit's decision, urges us to adopt the analysis of the court in the *Malmed II* decision. Petitioners agree that they are making the same United States Constitution challenges to the constitutionality of Pa. Const. art. V, § 16(b) as were made in *Malmed I* and *II*. They request that this court adopt the reasoning of the district court's decision in *Malmed I*.

Careful review of both decisions shows disagreement concerning (1) viability and application of the "irrebuttable presumption" doctrine and (2) application of the equal protection rational basis test. At this preliminary point in the litigation of the instant case, we are unwilling

to adopt the rationale of either decision.[15] The determinations of the federal courts in *Malmed I* and *II* were based on an evidentiary record. All we have before us is a petition, preliminary objections to the petition, Intervenors' petition, and Petitioners' motion for summary relief.

Ten years have passed since the creation of record on which the decisions in *Malmed I* and *II* were based; twenty years have passed since the provision mandating retirement of judges at age 70 became part of the Pennsylvania Constitution. The Pennsylvania Supreme Court in *Craig v. Magee Memorial Rehabilitation Center*, 512 Pa. 60, 65, 515 A.2d 1350, 1353 (1986), recognized that the passage of time might show that the means used to pursue legitimate government goals might "run too tight a

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[15] We do not at this time make any decision as to the viability of the "irrebutable presumption" doctrine or the appropriate test to be applied in determining if the due process and equal protection clauses have been violated. Pennsylvania has recognized three possible tests for evaluating fourteenth amendment challenges. *James v. Southeastern Pennsylvania Transportation Authority*, 505 Pa. 137, 477 A.2d 1302 (1984). These are: (1) rational basis, applied if neither a suspect class nor a fundamental right is involved; (2) strict scrutiny, applied if a suspect class or fundamental right is involved; (3) intermediate, applied when the classification is "sensitive" and the right, while not fundamental, is "important." *Id.*, 505 Pa. at 145, 477 A.2d at 1305-06. We note that, in addition to pleading the loss of a property right (employment), the loss of a liberty right (Reputation) is alleged in the petition in this case. This right does not appear to have been considered in either *Malmed I* or *II* and might have some impact on the analysis.

gauntlet through due process."[16] Because of the passage of time, we believe that Petitioners' challenges to the constitutionality of the mandatory retirement of judges at age 70, based on the fourteenth amendment of the United States Constitution, warrant our consideration.

We do agree with the Third Circuit's observation in *Malmed II* that in assessing the constitutionality of the provision mandating retirement of judges at age 70, the four reasons for recommending that constitutional provision, expressed by the Judiciary Subcommittee of the Preparatory Committee for the Pennsylvania Constitutional Convention of 1967, must be considered. These reasons are quoted in *Malmed II*, 621 F.2d at 568, and can be summarized as follows: (1) increase in "judicial manpower" by bringing in younger judges and permitting retired judges to serve as senior judges;[17] (2) "eliminates

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[16] The supreme court in *Craig* suspended the portion of Pa.R.C.P. No. 238 which provided for the mandatory imposition of prejudgment interest in certain instances to plaintiffs who received jury verdicts in excess of the defendant's settlement offer because in practice the assessment violated the fourteenth amendment. Five years earlier in *Laudenberger v. Port Authority of Allegheny County*, 496 Pa. 52, 69, 436 A.2d 147, 156 (1981), the supreme court, facing the same constitutional challenges as were made in *Craig*, concluded that that same provision in Rule 238 bore a "fair and substantial relationship to its articulated goal" and did not violate the due process and equal protection clauses of the fourteenth amendment.

[17] Article V, section 16(c) of the Pennsylvania Constitution provides: "A former or retired justice or judge may, with his consent, be assigned by the Supreme Court on temporary judicial service as may be prescribed by the rule of the Supreme Court." Elected judges who wish to be considered for

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unpleasantness of removing aged and disabled judges on an individual selective basis;" (3) prevention of harm by senile judges "offsets loss of judges who retain full powers past normal age;" and (4) "corresponds with current trend towards mandatory retirement in other public and private employments." The passage of time and experience may have shown that these reasons no longer exist or that mandatory retirement of judges at age 70 has not achieved the objectives sought.

What has occurred in the twenty years since the adoption of the mandatory retirement constitutional provisions is obviously factual in nature and can not be determined without the aid of an evidential record. Actu-rial(sic) tables showing normal life expectancy and studies demonstrating the "normal age" to which there is retention of full mental powers in 1988 could be used as evidence to refute the premise that age 70 is past the normal age at which "full powers" are retained. Evidence as to disuse or removal of mandatory retirement ages in public or private employment would tend to demonstrate there is no "current trend towards mandatory retirement." Evidence showing that competent judges decline to seek a senior judge position, because of the loss of status, might imply a lack of experienced judicial personnel in certain courts and offset any increase in "judicial manpower" gained by bringing in younger judges. Data indicating the number of judges who, after investigation and recommendation by the Judicial Inquiry and Review

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temporary assignment as senior judges must have served at least six years as a judge prior to retirement. 42 Pa.C.S. § 102.

Board, have been removed from office could be used to demonstrate that eliminating the "unpleasantness of removing aged and disabled judges on an individual selective basis" is no longer a legitimate government reason. These are only examples of the types of proof which would be necessary for Petitioners to prevail on their challenge to the constitutionality of Pa. Const. art. V, § 16(b) and are presented to illustrate the material issues of fact present in this case.

IV. CONCLUSION

Because we do conclude that the petition filed in this case does state a cause of action upon which the Pennsylvania constitutional provision mandating retirement of judges at age 70 could be declared unconstitutional under the United States Constitution, we propose that the Commonwealth's preliminary objections be overruled. As the discussion in section III indicates, there are issues of material fact which must be decided before the constitutionality of Pa. Const. art. V, § 16(b) can be resolved. Therefore, we propose that Petitioners' motion for summary relief be denied.

CRAIG and DOYLE, JJ., join in this opinion.

COLINS, Judge, concurring and dissenting.

I agree with the result reached in the opinion in support of denying summary relief and overruling preliminary objections insofar as it overrules the preliminary objections based upon its interpretation of the U.S. Constitution. I further agree with the conclusion that ADEA

does not apply to elected judges within the Commonwealth of Pennsylvania.

However, I must strongly disagree with the position set forth in the opinion in support of denying summary relief and overruling preliminary objections that Article I of the Pennsylvania Constitution does not prohibit age discrimination such as that which is presently before the Court; i.e., a determination based solely upon one's birthdate without any consideration of the individual's ability to perform his/her duties.

The "Declaration of Rights," contained in the Constitution of 1776, was enacted fifteen years prior to the adoption of the Bill of Rights contained in the U.S. Constitution. These rights were later incorporated into Article IX of the Constitutions of 1790 and 1838 and were again codified as Article I of the Constitution of 1874.

It is clear, upon thorough analysis, that the protections afforded by the original Bill of Rights were meant to remain inviolate unless specifically retracted or abolished by future amendments to the Constitution.

The retirement provision, as adopted in 1968 by Article V, Section 16(b), does not, even arguably, purport to abolish, amend, or delete the original Bill of Rights which has been the cornerstone of the Commonwealth's existence. Yet, the net effect of Article V, Section 16(b) is to confiscate a property right in employment, created by the voters and commissioned by the Governor, upon an individual's reaching his/her seventieth birthday.

The instant scenario, simply put, is that in a technical or "housekeeping" amendment, generated by the Constitutional Convention of 1968, a constitutional provision has been created which is in direct conflict with the protections contained in the Commonwealth's Bill of Rights.

This is a matter of first impression; however, the fact that those guarantees contained in the Bill of Rights may be superior to other constitutional guarantees was first recognized by our Supreme Court in *Armstrong v. King*, 281 Pa. 207, 126 A. 263 (1924), which declared that, although the Constitution "should contain only that which is fundamental, we are constantly made aware of the fact that many details are embodied in it which more properly belong in legislation . . . [b]ecause of these facts, all that is said in the Constitution is not of the same mandatory force; in the nature of things, some of the detailed provisions must be treated as directory only." *Id.* at 216, 126 A. at 266 (citations omitted). This argument was succinctly made in Section 2 of petitioner Katz' brief and should be the proper rationale for the decision of this Court.

It is beyond argument that the Constitution of 1968, insofar as it relates to mandatory age discrimination against elected judges, is not based upon a rational distinction. Yet, without this rational distinction, petitioner Katz and other dedicated servants in the future will be stripped of their salaries, offices, careers, and, in many instances, their dignity, despite having commissions signed by the Governor of the Commonwealth indicating that they were elected to serve in their offices to dates well beyond that of their forced retirement.

In conclusion, I reiterate my position that a constitutional amendment, enacted subsequent to the Commonwealth's original Bill of Rights cannot impair or impede any rights guaranteed by said bill unless the amendment clearly declares to do so.

In this opinion, I, by no means, mean to detract from the scholarly and prosaic opinion in support of denying summary relief and overruling preliminary objections. This is obviously an issue of first impression upon which reasonable people will differ.

This grave constitutional question must, and no doubt will, eventually be decided by the Supreme Court of the Commonwealth.

I would grant summary judgment in favor of the petitioners, as well as overrule the respondent's preliminary objections.

McGINLEY and SMITH, JJ., join in this opinion.

CRAIG, Judge, concurring.

This opinion signifies joinder in Judge Palladino's Opinion In Support of Denying Summary Relief and Overruling Preliminary Objections, and also offers a brief concurring supplement, with respect to:

1. The undesirable concept of discarding a state constitutional provision ratified by the electorate on the basis of a judicial determination that another provision of the same constitution has greater weight; and

2. The strength and weakness of the decision of the United States Court of Appeals on the federal constitutional questions.

The Pennsylvania Constitution

A ratification vote of the Pennsylvania electorate adopted the Pennsylvania Constitution provision, Pa. Const. art. V § 16(b), mandating the retirement of judges at age 70.

By ratification votes of no greater or lesser significance, the Pennsylvania electorate adopted art. I, § 1, the inherent rights provision, and art. I, § 26, the provision forbidding discrimination.

Therefore, it is indeed sound to reject the concept that the judiciary could have power to elevate any provision of the state constitution over another provision of the same fundamental law of the Commonwealth, when all provisions have been equally ordained by vote of the electorate.

The judiciary should avoid substituting its view as to the relative weight of various constitutional provisions, in place of the necessarily equal import of voter ratification of all provisions.

The United States Constitution

Of course, a state court must recognize that a federal constitutional provision, adopted by the people of the nation, can prevail over a state constitutional provision ratified by the electorate of a single state.

However, because the decisions of the United States Court of Appeals, although persuasive, are not binding upon us as to the federal due process and equal protection issues presented here, overruling of the Commonwealth's preliminary objections is sound.

Moreover, in *Malmed v. Thornburgh*, 621 F.2d 565 (3d Cir.), *cert. denied*, 449 U.S. 955, 101 S.Ct. 361, 66 L.Ed.2d 219 (1980), the Court of Appeals, having reversed the district court on the legal matter of burden of proof, need not have entered judgment for the Commonwealth, as it did, but could have remanded the case for a new trial.

A decision that this court receive evidence in this case, giving attention to the persuasive view of the Court of Appeals as to the burden of proof, is therefore the proper course for this court to take in lieu of rendering a final judgment either way at this juncture.

> In *Malmed*, the Court of Appeals stated: In sum, the district court erroneously placed a burden on the appellants [Commonwealth] to rebut a limited argument by appellees [judges]. The correct approach would have been to require the appellees to prove that the Pennsylvania Constitutional Convention had no reasonable basis for believing the four reasons stated for the adoption of the mandatory retirement provision. *See Vance v. Bradley*, 440 U.S. at 112, 99 S.Ct. at 951. . . .

Vance v. Bradley, 440 U.S. 93, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979) involved a federal law requiring foreign service personnel to retire at age 60.

Accordingly, the reception of evidence pursuant to the foregoing guidance is a sound course.

ORDER

PER CURIAM.

Now, November 3, 1988, the court being equally divided, petitioners' Motion for Summary Relief is

denied. Respondent's Preliminary Objections are overruled; respondent shall file its answer within thirty (30) days from the date of this order.

It is also ordered that, pursuant to 42 Pa.C.S. § 702(b), this court is of the opinion that this case involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this case.

CRUMLISH, President Judge and BARRY J., did not participate in the decision in this case.

The Supreme Court of Pennsylvania
Western District

PROTHONOTARY
IRMA T. GARDNER
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April 19, 1989

Henry T. Reath, Esquire
Daniel P. Mazo, Esquire
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In Re: Harold Gondelman, on his own behalf and on behalf of all others similarly situated, et al. v. Commonwealth of Pennsylvania Nos. 49 W. D. Misc. Docket 1988 and Nos. 97, 98 W. D. Appeal Docket 1988

Gentlemen:

The Court has entered the following Order on your Application for Reargument in the above matter:

"PER CURIAM:

AND NOW, this 18th day of April, 1989, the Application for Reargument is denied.

Mr. Justice Papadakos dissents and would grant reargument."

Very truly yours,

/s/ Irma T. Gardner
DEPUTY PROTHONTOARY(sic)